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No. 09-1104

IN THE

Supreme Court of the United States

MARLENE WHITTIER,

Petitioner,

v.

DANIEL KOBAYASHI, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT DANIEL KOBAYASHI

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit Court of Appeals correctly determined that Sergeant Daniel Kobayashi had *arguable reasonable suspicion*, and thus qualified immunity, for a no knock entry at the home of Anthony Diotaiuto, who was known to: (1) be operating a narcotics distribution operation out of his home; (2) have a criminal record pertaining to illegal drugs; (3) possess numerous weapons in his home; (4) carry a firearm on him at all times; (5) use illegal drugs; (6) be unusually awake with lights on at 5:00 a.m. on the morning of the raid (despite having worked past midnight at a bar); and (7) have additional occupants in the home.

2. Whether the Eleventh Circuit's opinion, based solely and expressly upon the arguable reasonable suspicion standard for qualified immunity, creates a conflict with other Circuit Courts pertaining to exigent circumstances within the realm of criminal suppression hearings, and the actual reasonable suspicion standard.

PARTIES TO THE PROCEEDING

The parties to this proceeding are: Petitioner, Marlene Whittier; and Respondents, Daniel Kobayashi, Erik Palacio, Andre Bruna, Sean Visners and Eric Goldstein.

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STATEMENT OF THE CASE

Petitioner, Marlene Whittier, is the personal representative of the Estate of Anthony Diotaiuto, an individual who ran a narcotics sale and distribution operation out of his home in Sunrise, Florida. In addition to his narcotics sales and personal illegal drug use, Diotaiuto collected guns, possessed a concealed weapons permit, and was known to carry a weapon on his person, as well as have a shotgun in close proximity to his illegal drugs. A friend of Diotaiuto who gave deposition testimony in the case before the District Court referred to him as a drug dealer and drug user who associated with drug users, gangsters, gang-types and thugs — people who had a "street mentality," who wore baggy clothes, dreadlocks and spoke of "nigger this" and nigger that." (R-138, #33, pp.27-29, 49)

Diotaiuto's operation continued unabated until a neighbor informed the Sunrise Police Department of the neighborhood drug house. An investigation ensued, and the narcotics detective developed concrete evidence that Diotaiuto sold large quantities of illegal drugs, that he received shipments of marijuana by the duffel bag, and that people in his home regularly used cocaine. (R-138, #11, p.12; #36, pp.21, 38-41). In addition to the narcotics, the detective learned of multiple weapons in the home, that Diotaiuto carried a gun, and guarded his illegal inventory with a nearby shotgun. (R-138, #12, pp.22-23).

The City's comprehensive investigation included surveillance, and background checks on individuals seen going to and from the residence, many of whom stopped

there for a matter of minutes (i.e. long enough engage in a drug transaction). (R-138, #12, p.27). It was through this surveillance that the City developed a confidential informant, who ultimately made a controlled drug buy. This informant further corroborated information regarding the firearms throughout the home.

After obtaining a search warrant, the narcotics detective prepared an operational plan and presented it to his supervisor. The plan reiterated that sources had confirmed that the subject was a narcotics dealer who had a semi-automatic handgun, a shotgun, a prior drug-related arrest, and that there was another known occupant in the house. (R-137). At the command level, the threat assessment was reviewed and then classified as "high risk," which the City defines as "involving acts of violence or potential acts of violence." (R-137, Tab 6). The National Tactical Officers Association, a worldwide association of thousands of tactical officers, incidentally promulgates a threat assessment scoresheet which, like the City of Sunrise, would have rated the threat here in the ***highest possible risk category*** available (35 points or more) based upon this criteria: (1) prior drug-related arrest; (2) additional occupant in the home; (3) presence of a shotgun; (4) presence of a handgun; and (5) suspect uses illegal drugs. (R-137, Tab 7).

On the morning of August 5, 2005, two officers conducted pre-raid surveillance at Diotaiuto's home and observed a garage door open and lights on at approximately 5:00 a.m., something which was unusual for an individual that worked past midnight at a bar. (R-138, #2, pp.10-21). An hour later, the City's SWAT team lawfully entered the home pursuant to a warrant

and found Diotaiuto in the living room, standing and staring right at the officers, all of whom were attired in black shirts with the word "POLICE" emblazoned in large white letters. The SWAT commander, Sergeant Kobayashi, yelled "get on the ground." Rather than comply, Diotaiuto ran to the master bedroom of the house and into the closet where he kept his guns, electing an armed confrontation, instead of exiting through the door within his bedroom that led outside. (Pet. App. F-6). Two officers, Sean Visners and Andre Bruna, followed.

Once inside the bedroom, the officers observed Diotaiuto grab his gun, rack the chamber and point it at them while the officers (again, in plainly clear police attire) were yelling at him to put the gun down. Shots were fired when Diotaiuto refused to lower his firearm. (Pet. App. F-6). Diotaiuto fell to the ground, but still mustered enough strength to raise and point his gun at the officers again. He was then fatally wounded, ending an incident which to this day remains the only time in nearly 200 Sunrise SWAT operations where any injury at all resulted.

REASONS FOR DENYING THE PETITION

I. THE PETITION FAILS TO DEMONSTRATE CIRCUIT CONFLICT WITH RESPECT TO THE ONLY SALIENT ISSUE OF WHETHER REASONABLE OFFICERS COULD HAVE DISPENSED WITH A KNOCK AND ANNOUNCE, AND THEREBY BE ENTITLED TO QUALIFIED IMMUNITY BASED UPON ARGUABLE REASONABLE SUSPICION

The Petitioner seeks a writ of certiorari from the August 31, 2009 ruling of the Eleventh Circuit Court of Appeals which afforded Sergeant Daniel Kobayashi qualified immunity on Petitioner's knock and announce claim. This was based upon the irrefutable conclusion that *arguable reasonable suspicion* existed, and that a reasonable officer could have dispensed with a knock and announce when faced with the circumstances that Kobayashi encountered. These were not only that the subject, Anthony Diotaiuto, sold drugs, but also used them, had a criminal history, carried a concealed weapon on his person, and kept a shotgun in his bedroom near the drugs. Not only that, but surveillance of the residence at 5:00 a.m., just an hour before the warrant service, revealed Diotaiuto, a bartender who worked nights, awake at home with lights on, and a garage door open.

Despite these facts, Petitioner seeks review and incorrectly frames the issue as being whether the Eleventh Circuit's decision improperly creates a blanket exception to knocking and announcing in any case involving suspicion of guns and drugs. That is plainly

not the holding of the Eleventh Circuit. Petitioner's error is evident because the Eleventh Circuit did not even decide whether, in fact, dispensing with the knock and announce here violated the Fourth Amendment in the first instance. For this reason, its Opinion does not conflict with any other Circuit's jurisprudence, and certainly not with any of the decisions cited in the Petition. The Eleventh Circuit's opinion, instead, is firmly rooted in qualified immunity, a legal concept in which state actors are sometimes not liable for damages even when they have possibly violated civil rights.

Just last year in *Pearson v. Callahan*, 129 S.Ct. 808, 172 L.Ed.2d 65 (2009), the Court discussed qualified immunity in a case involving alleged exigent circumstances and narcotics. The Court reiterated that this doctrine protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 129 S.Ct. at 815 (*citing*, *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). "Qualified immunity balances two important interests — the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Id.* It protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 89 L.Ed.2d 271, 106 S.Ct. 1092 (1986). Notably, the protection applies even when an official errs with respect to facts and law. *Id.* (*citing*, *Groh v. Ramirez*, 540 U.S. 551, 567, 124 S.Ct., 157 L.Ed.2d 1068 (2004). As such, it is not uncommon for officers to be afforded qualified

immunity even if there is an underlying constitutional violation, something which this Court clearly contemplated when fashioning the second of the two-part test in *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001).

The concept of knocking and announcing stems from the Fourth Amendment, which protects individuals from unreasonable searches and seizures. *U.S. Const. amend IV*. The reasonableness inquiry includes the common law principle that law enforcement officers should usually knock and announce their presence and then wait a reasonable time before entering. *Wilson v. Arkansas*, 514 U.S. 927, 931-34, 115 S.Ct. 1914, 131 L.Ed.2d 976 (1995); *Richards v. Wisconsin*, 520 U.S. 385, 117 S.Ct. 1416, 137 L.Ed.2d 615 (1997). The Court has recognized, however, that compliance is excused when officers have a "reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation fo the crime by, for example, allowing the destruction of evidence." *Richards*, 520 U.S. at 394. A "reasonable suspicion" is a "minimal level of objective justification." *U.S. v. Sokolow*, 490 U.S. 1, 7, 104 L.Ed.2d 1, 109 S.Ct. 1 (1989). This standard requires "more than an inchoate and unparticularized suspicion or hunch," but "considerably less than proof . . . by a preponderance of the evidence." *Alabama v. White*, 496 U.S. 325, 329-30 (1990).

Like the several criminal cases (in which the United States was a party) relied upon by Petitioner, the issue often arises in the context of a motion to suppress, in which *actual reasonable suspicion* to dispense with the

knock and announce is tested. That standard, however, makes no allowances for errors by those who are *not* plainly incompetent, those who do *not* knowingly violate the law, or for possible violations of law which perhaps have not been clearly established, as this Court has mandated *must* be considered in qualified immunity cases. *See, Malley, Harlow, supra.* Conversely, the Eleventh Circuit's opinion below, which makes those allowances, applies the correct analysis in affording qualified immunity to the Sunrise officers where they had *arguable reasonable suspicion* of exigent circumstances. (Pet. App. A-8); *Jackson v. Sauls*, 206 F.3d 1156, 1166 (11th Cir. 2000); *Brent v. Ashley*, 247 F.3d 1294, 1303 (11th Cir. 2001).

The standard of "*arguable* reasonable suspicion" or "*arguable* probable cause" (as opposed to actual probable cause) in qualified immunity cases, while notably absent from any argument in the Petition, is the test in the Eleventh Circuit and elsewhere. *See, Gil v. County of Suffolk*, 590 F.Supp.2d 360, 370 (E.D.N.Y. 2008) (*citing, Caldarola v. Calabrese*, 298 F.3d 156, 161 (2d Cir. 2002)) (noting that in qualified immunity cases, arguable reasonable suspicion and arguable probable cause apply instead of actual reasonable suspicion and probable cause); *Vondrak v. City of Las Cruces*, 535 F.3d 1198, 1207 (10th Cir. 2008); *Young v. Eslinger*, 244 Fed. Appx. 278 (11th Cir. 2007); *Baribeau v. City of Minneapolis*, 596 F.3d 465 (8th Cir. 2009); *Kauch v. City of Cranston*, 59 Fed. Appx. 350 (1st Cir. 2003); *Blaylock v. City of Philadelphia*, 504 F.3d 405 (3d Cir. 2007); *Payne v. City of Olive Branch*, 130 Fed. Appx. 656 (5th Cir. 2005); *Braun v. Baldwin*, 346 F.3d 761 (7th Cir. 2003). Stated another way, when taking the qualified

immunity defense into consideration (which the Petitioner here has not), the issue is not whether a reasonable officer ***would*** have found exigent circumstances, but whether a reasonable officer ***could*** have found them. *See, e.g.*, *Cortez v. McCauley*, 478 F.3d 1108, 1120 (10th Cir. 2007); *Humphrey v. Staszak*, 148 F.3d 719, 725 (7th Cir. 1998) ("arguable probable cause exists when a 'reasonable officer in the same circumstances and with the same knowledge . . . as the officer in question *could* have reasonably believed that probable cause existed in light of well-established law'"); *Young v. Eslinger*, 244 Fed. Appx. 278, 279 (11th Cir. 2007) ("when a law enforcement officer seeks summary judgment on the basis of qualified immunity, we determine only whether reasonable officers in the same circumstances and possessing the same knowledge as the Defendants could have believed that [reasonable suspicion or] probable cause existed"); *Thompson v. Mahre*, 110 F.3d 716, 722 (9th Cir. 1997) (*citing*, *Anderson v. Creighton*, 483 U.S. 635, 641, 97 L.Ed.2d 523, 107 S.Ct. 3034 (1987) ([officer's] defense does not require him to establish that he was correct in thinking that police would be met with force or evidence destroyed. All he needs is qualified immunity, which he has if a "reasonable officer could have believed [the forcible entry without announcement and opportunity to comply peacably] to be lawful, in light of clearly established law and the searching officers possessed.")).

Petitioner misses the mark when advancing that the Eleventh Circuit's decision creates tension with the

miscellaneous suppression of evidence cases proliferating her argument. Given that these are criminal actions, the concept of qualified immunity is not discussed or analyzed at all. Not only that, many of the cases upon which Petitioner relies uphold decisions to dispense with knock and announce based upon exigent circumstances, even where they were required to be *more than arguable*. For instance, in *U.S. v. Nabors*, 601 F.2d 1351 (6th Cir. 1990), the Sixth Circuit upheld the officers' no-knock entry since the subject had a criminal history, drugs and firearms, much like Anthony Diotaiuto. In *U.S. v. Spinelli*, 848 F.2d 26 (2d Cir. 1988), the Second Circuit held that the home of a gun-carrying narcotics dealer who seemed to be aware that officers were surveilling him (like the decedent here who was awake with his lights on at 5:00 a.m.) may be entered without knocking and announcing since doing so could result in violence or the destruction of evidence. Hence, although she claims Circuit conflict utilizing inapposite authorities lacking qualified immunity analysis, Petitioner fails to demonstrate any actual tension.

The fallacy of the Petition is never more apparent than where it claims that the Eleventh Circuit disregards *Richards* and creates a blanket exception in cases involving drugs and guns. No reasonable reading of the opinion below could lead to that conclusion, particularly since the *Whittier* court cites to *Richards* and expresses that it creates no such exception. The court instead based its decision on whether Kobayashi could have had arguable reasonable suspicion based upon a totality of

the circumstances in this case, never opining as to whether those exigent circumstances actually existed:

> Our inquiry is whether Kobayashi had arguable reasonable suspicion that exigent circumstances existed to justify a no-knock entry, and thus we specifically decline to address whether exigent circumstances did indeed exist under the facts of this case. In a footnote of its order denying the SWAT team leader's motion for summary judgment as to the knock-and-announce claim, the district court concluded no exigent circumstances existed. On appeal, we do not disturb this determination because the pertinent inquiry is not whether exigent circumstances *actually* existed, but whether a reasonable officer, acting under the same circumstances and possessing the same knowledge as Kobayashi, *could have believed* they did.

(Pet App. C-8, n.2) (emphasis in original). This note by itself refutes any notion that the Eleventh Circuit's opinion conflicts with any other Circuit's opinion on the issues argued by Petitioner, to wit: whether exigent circumstances were actually present.

Reliance upon inapposite decisions and inaccurately claiming that the Eleventh Circuit created a blanket exception to knocking and announcing (in certain cases) are not the Petition's only shortcoming. It also tellingly fails to demonstrate that any purported violation by the Sunrise officers here were in violation of clearly established law, the second part of the *Saucier* test. The

Court has said that an official is entitled to notice that his conduct is unlawful and to "fair warning" that his actions deprived another of a constitutional right. *Saucier*, 533 U.S. at 121. "For a constitutional right to be clearly established, its contours must be 'sufficiently clear that a reasonable official would understand that what he is doing violates the law." *Id.* (*quoting*, *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987)). The unlawfulness must be apparent. Toward that end,

> "in many — if not most — instances, the apparency of an unlawful action will be established by (if it can be established at all) preexisting caselaw which is sufficiently similar in facts to the facts confronting an officer, such that we can say every objectively reasonable officer would have been on 'fair notice' that the behavior violated a constitutional right.'"

Willingham v. Loughnan, 321 F.3d 1299, 1301 (11th Cir. 2003). While materially similar caselaw is not *always* necessary to give fair warning, if case law has not staked out a bright line, a plaintiff typically must show that the actions clearly exceeded a "hazy border" of acceptable conduct. *Loughnan*, 321 F.3d at 1303; *Hope v. Pelzer*, 536 U.S. 730, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002).

Importantly, the Eleventh Circuit Court of Appeals — the jurisdiction in which Sergeant Kobayashi serves as a law enforcement officer — has noted that "public officials are not obligated to be creative or imaginative in drawing analogies from previously decided cases" and

that law is clearly established for qualified immunity purposes only when it arises from the U.S. Supreme Court, the Eleventh Circuit Court of Appeals, or the highest court of the state. *Jenkins v. City of Talladega*, 115 F.3d 821, 825 (11th Cir. 1997); *Hamilton v. Cannon*, 80 F.3d 1525, 1532, n.7 (11th Cir. 1996). Hence, Sergeant Kobayashi was not charged with knowing the universe of interpretive decisions, and analyzing appellate decisions of criminal suppression hearings in Nebraska (*U.S. v. Lucht*); Iowa (*U.S. v. Marts*); Illinos (*U.S. v. Jones*); and New York (*U.S. v. Spinelli*). The federal district in which he served as an officer simply did not charge him with performing the wide-ranging analysis that Petitioner seeks to impose.

Even if Sergeant Kobayashi had undertaken a nationwide analysis, he would have discovered that exigent circumstances are analyzed on a case-by-case basis, and that courts from around the country invariably reach different results when interpreting different case-specific facts, all while uniformly adhering to the Court's prohibition of blanket exceptions in narcotics cases. *See, Richards v. Wisconsin*, 520 U.S. 385, 388 (1997). He too, in theory, would have concluded that given the requisite fact-specific inquiry, there was no clear notice that the Constitution required a knock and announce under the precarious situation he faced. In *U.S. v. Bynum*, 362 F.3d 574 (9th Cir. 2004), Bynum, who was convicted of being a felon in possession of firearms, challenged the officers' failure to comply with the "knock and announce" requirement when executing a search warrant. The involved officers had received information from a confidential informant that narcotics could be purchased from a home, which was later

determined to be Bynum's residence. The police initiated surveillance and relied upon a controlled purchase of drugs. In the course of the investigation, like in the instant case, the police learned that the suspect was armed with a weapon kept on his person. *Id.* at 577. After obtaining a search warrant, the police proceeded to Bynum's residence, detonated two distraction devices, opened the door with a battering ram, executed the search warrant and discovered contraband. Following an evidentiary hearing, the court found that the officers had a reasonable suspicion that knocking and announcing could pose a danger based upon Bynum's possession of weapons.[1] This determination was upheld without regard to qualified immunity which, again, affords officers considerable discretion and leeway by protecting all but the "plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092 (1986).

The Fourth Circuit applied similar reasoning in *Johnson v. City of Aiken*, 2000 U.S. App. LEXIS 3628 (4th Cir. 1999). There, the police utilized a SWAT team to enter into a home in which they suspected there would be drugs and a heavily armed drug dealer. After an adverse jury verdict, the officers appealed, claiming an entitlement to qualified immunity. The Fourth Circuit agreed since the conduct did not transgress "a bright line" which has been "authoritatively decided by cases of controlling authority" or where a consensus of cases

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1. The court explained that the exigency exception to 18 U.S.C. §3109 is measured by the same standard as applied to the Fourth Amendment reasonableness inquiry articulated in *Richards v. Wisconsin, supra.*

of persuasive authority necessitated "that a reasonable officer could not have believed that his actions were lawful." *Id.* at * 20. The court held that the officers had reasonable suspicion (a "minimal level of objective justification") to believe that exigent circumstances existed because they were to search the home of someone believed to be a "heavily armed drug dealer" that had "readily accessible firearms." *See also*, *U.S. v. Washington*, 340 F.3d 222 (5th Cir. 2003) (officers had reasonable suspicion of exigent circumstances where officers "believed that the suspect was selling drugs and was typically armed," despite knowledge that room to be searched lacked plumbing which could facilitate disposal of drugs); *Toliver v. Baxter County*, 2006 U.S. Dist Lexis 52976 (W.D. Ark. 2006) (reasonable to engage in no-knock entry based upon knowledge of drugs in home and that subject was involved with firearms); *U.S. v. Stevens*, 439 F.3d 983 (8th Cir. 2005) (no-knock entry was justified where the officers knew the house contained weapons and one of the occupants was considered dangerous); *Thompson v. Mahre*, 110 F.3d 716 (9th Cir. 1997) (reasonable officer could have believed that forcible entry was necessary to protect against armed resistance and destruction of evidence; qualified immunity exists even if judgment was mistaken).

Notably, the above opinions were rendered subsequent to this Court's 1997 opinion in *Richards v. Wisconsin*, and are not the result of any purported Circuit conflict or creation of a blanket drugs/guns exception in violation of *Richards*. Quite to the contrary, the opinions adhere to *Richards* but decide nonetheless that no-knock entries were allowed given that a showing of "reasonable suspicion" is not rigorous or high. *Richards*, at 394.

Here, where Kobayashi was faced with a warrant where the risk assessment fell in the highest possible threat category under the National Tactical Officer's Association matrix, and where the warrant was to be served upon: (1) a felony narcotics dealer; (2) who kept a semi-automatic handgun on his person; (3) who was otherwise heavily armed with additional weapons, including a shotgun near the drugs; (4) who could quickly dispose of contraband by keeping drugs in a bedroom with an interior toilet; (5) who had a prior drug-related arrest, (6) who resided with an additional occupant; and (7) who was unusually awake at 5:00 a.m., this ***could have*** led to objectively reasonable suspicion that a knock and announce might endanger the officers or inhibit their investigation of the drug-related activities.

For these reasons, Petitioner has not carried her burden of demonstrating that the Eleventh Circuit's Opinion conflicts with a decision of this Court or a Court of Appeals.

II. THE UNDERLYING ISSUE OF THE APPLICATION OF, AND EXCEPTIONS TO THE KNOCK AND ANNOUNCE REQUIREMENT HAVE BEEN ADDRESSED BY THIS COURT SEVERAL TIMES, MOST RECENTLY IN 2006, AND THE 11TH CIRCUIT COURT OF APPEALS PLAINLY ADHERED TO THAT LAW IN ITS DECISION; HENCE THERE IS NO ISSUE OF CRITICAL IMPORTANCE PRESENTED BY THE PETITION

Petitioner incorrectly claims that tension exists between the Eleventh Circuit and this Court's prior rulings, and that additional guidance should be provided. There is certainly no dearth of opinions from the Court on the knock and announce requirement, and the parameters of exigency to dispense with same. *See, Wilson v. Arkansas*, 514 U.S. 27 (1995); *Richards v. Wisconsin*, 520 U.S. 385 (1987); *Michigan v. Hudson*, 547 U.S. 586 (2006). As previously stated, there is also not the slightest indicia that the Eleventh Circuit's decision runs afoul *Richards*, creating a blanket exception to the knock and announce requirement in all cases involving drugs and weapons. To the contrary, the Eleventh Circuit, as stated above, specifically limited its opinion to qualified immunity under the arguable reasonable suspicion standard, and stayed in line with Supreme Court precedent quite expressly.

In addition, Petitioner has not shown that the Eleventh Circuit's opinion conflicts with any other Circuit analyzing whether to afford qualified immunity to an officer on alleged no-knock entry claim, under similar circumstances that Sergeant Kobayashi faced here.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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